



1 before the order was issued; (2) there are newly discovered material facts that the movant  
2 could not have discovered through reasonable diligence before the order was issued;  
3 or (3) material facts have occurred or the law has changed after the order was issued. *See*  
4 *Motorola, Inc. v. J.B. Rodgers Mech. Contrs., Inc.*, 215 F.R.D. 581, 586 (D. Ariz. 2003)  
5 (discussing various district court local rules regarding motions for reconsideration and  
6 adopting Central District of California's standard because it "captures the most common  
7 elements of the various local rules" and "best balances the competing interests of judicial  
8 accuracy and judicial economy").

9 Defendants' in their motion for reconsideration raise several new arguments that  
10 were not present in either their motion for partial summary judgment or their reply in  
11 support of the motion. Docs. ##42, 54. Defendants' new arguments include (1) Plaintiff's  
12 lack of personal knowledge that he was replaced by Brad Rhodes, a lesser qualified non-  
13 Hispanic; (2) the lack of causal connection between the racial jokes told by Supervisor  
14 Hicks and Plaintiff's termination by a different supervisor a year after the comments were  
15 made; (3) the lack of personal knowledge of Plaintiff's negative work evaluation allegedly  
16 made in retaliation for an email he sent; and (4) the lack of personal knowledge of Plaintiff's  
17 statement that non-Hispanic supervisors received more employee help than Plaintiff.  
18 Doc. # 57. In response to the Court's denial of summary judgment on their mitigation of  
19 damage defense (Doc. #55), Defendants raise a new argument that they are relieved of the  
20 burden to prove the availability of "substantially equivalent jobs" once it has been shown  
21 that the former employee has made no effort to seek employment. Doc. #57 at 10-11. The  
22 Court will not consider arguments that Defendants failed to raise in the briefing on their  
23 prior motion for partial summary judgment. *See United States v. Rezzonico*, 32 F. Supp. 2d  
24 1112, 1116 (D. Ariz. 1998) (motions for reconsideration are not the place for parties to  
25 make new arguments.)

## 26 **II. Analysis.**

27 To establish a prima facie case, Plaintiff must prove that he was "(1) a member of a  
28 protected class; (2) performing his job in a satisfactory manner; (3) discharged; and (4)

1 replaced by a [person outside of his protected class] with equal or inferior qualifications.”  
2 *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9<sup>th</sup> Cir. 1994). The parties do not dispute that  
3 Plaintiff is a member of a protected class or that he was discharged.

4 The Court found in its July 6, 2005 Order that Plaintiff presented sufficient evidence  
5 to create an issue of fact on whether he performed his job in a satisfactory manner. Doc.  
6 #49, Ex. V. Defendants correctly point out that the Court mistakenly stated that  
7 Defendants fired Plaintiff for not performing his job satisfactorily. Doc. #57 at 3. This  
8 error, however, does not change the Court’s conclusion that Plaintiff presented sufficient  
9 evidence to raise a question of fact on the second element of his prima facie case – that he  
10 was performing his job in a satisfactory manner. Doc. #55.

11 The Court also found the fourth prong of Plaintiff’s prima facie case satisfied  
12 because Plaintiff stated in his verified complaint that he was replaced by a non-Hispanic  
13 employee with lesser qualifications.<sup>1</sup> Doc. #55. In paragraph 12 of his verified complaint,  
14 Plaintiff alleges that he was replaced by Brad Rhodes, a lesser qualified non-Hispanic.  
15 Defendants did not challenge the admissibility of this statement in either their motion for  
16 partial summary judgment or their reply and therefore cannot challenge the admissibility  
17 now. Construing the evidence in Plaintiff’s favor, the Court finds that Plaintiff has  
18 presented sufficient evidence to satisfy his prima facie case for discrimination under Title  
19 VII. *See Wallis*, 26 F.3d at 891.

20 The Court also finds that Plaintiff produced sufficient evidence to create an issue  
21 of fact on whether Defendants’ stated reason for his termination – insubordination – was  
22 pretextual. In its July Order, the Court relied on five statements in Plaintiff’s verified  
23 complaint that might lead a reasonable jury to concluded that Defendants maintained  
24 animus against Plaintiff because of his race. Doc. #55 at 4. Defendants now argue that the  
25 Court erred in relying on these statements because they “are not based on personal

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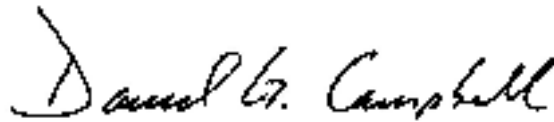
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27 <sup>1</sup> “A plaintiff’s verified complaint may be considered as an affidavit in opposition to  
28 summary judgment if it is based on personal knowledge and sets forth specific facts.”  
*Lopez v. Smith*, 203 F.3d 1122, 1132, n.30 (9<sup>th</sup> Cir. 2000).

1 knowledge, are without foundation, and/or are immaterial to plaintiff's discrimination  
2 claim." Doc. #57 at 3. But Defendants only challenged one of these statements as  
3 inadmissible in their motion for partial summary judgment. Doc. # 42 at 8 ("Aguirre  
4 admitted that he has no personal knowledge of what happened between Hicks and Cossins  
5 Wineke and that he has no personal knowledge about what discipline, if any, was imposed  
6 upon Hicks."). Even if Defendants are correct in arguing that the Court erred in relying on  
7 Plaintiff's statement involving Mr. Hicks, the Court's conclusion is not altered because the  
8 remaining four statements are sufficient to raise an issue of fact concerning Defendants'  
9 animus towards Plaintiff. *See Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1127  
10 (9th Cir. 2000) ("The plaintiff is required to produce very little direct evidence of the  
11 employer's discriminatory intent to move past summary judgment.").

12 **IT IS SO ORDERED** that Defendant's Motion for Partial Summary Judgment  
13 (Doc. # 57), deemed to be a motion for reconsideration, is **denied**.

14 The Court will schedule a Final Pretrial Conference by separate order.

15 DATED this 15<sup>th</sup> day of December, 2005.

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19 David G. Campbell  
20 United States District Judge  
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